Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, appellant, vs. FREDERICK S. PASSAVANT ET ALS.	No. 129.

APPELLEES' BRIEF.

Statement.

Between May 22, 1891, and March 13, 1892, the appellees, Passavant & Co., imported into New-York cotton velvets from Germany. These velvets had been imported into Germany 'in the gray', there dyed, finished and put into bond for exportation. (Rec. 1, fol. 2.)

Their invoices stated the net invoice value of the merchandise; and also, under duress, certain other sums under the heading 'German duty,' which is a tax the German government imposes only when the goods are sold for consumption in that country. When purchased there in bond (or consigned while there) for exportation this duty is remitted; which remission is known as a 'bonification of tax,' as distinguished from a tax collected and refunded. This 'German duty' is a tax levied upon the goods when consumed in

Germany; collected only when the finished product goes into consumption there, but remitted when that finished product is sold in bond for exportation. The merchandise can be purchased in bond, for exportation, in the principal markets of Germany, at the net invoice prices, without payment of this so-called 'German tax.' These goods, so imported by appellees, were so purchased for exportation. *(Ibid.*, pp. 1, 2, fols. 2, 3.*)*

The local appraiser reported to the collector, as the *dutiable* value of these goods, the aggregate of the net invoice values plus this 'German duty;' adding as an element of *dutiable* value the amounts so specified under the heading 'German duty' to the net invoice values. *(Ibid.* 2, fol. 3, § 10.*)*

These amounts of 'German duty' had been included by the importers in their entries, in the form abovementioned, under duress, to avoid threatened penalties under the law. *(Ibid.*, fol. 3, § 9.*)*

The collector assessed duty upon the gross amount so reported to him by the local appraiser. Without calling for any re-appraisement, the importers seasonably protested, in substance, against the illegal inclusion of this so-called 'German duty' in the *dutiable* value adopted by the collector as the basis of his assessment and exaction of duties. *(Ibid.* pp. 2, 3; fols. 3, 4, 5.*)*

The Board of General Appraisers reversed the collector " upon the ground that this 'German duty' *was not a lawful element of dutiable value.*" *(Ibid.*, 3, fol. 4, § 12.*)*

The Circuit Court sustained this action of the Board. *(Ib.* fol. 5, § 13.*)*

Upon the government's appeal to the U. S. Circuit Court of Appeals, that Court submits to this Court these two questions, viz.;—

" 1. In proceedings brought before the Board of General Appraisers by protests, under Sec. 14, act of June 10, 1890, to review the collector's decisions upon the entries in this case, had the Board jurisdiction to

inquire into and impeach the *dutiable* valuation so reported to the Collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject? (Rec. 3, bottom.)

(2.) "If the first question is answered in the affirmative, was the 'German duty' lawfully included by the Appraiser in his estimate of *dutiable* value?" *(Ibid.* 4, top.*)*

POINTS.

1.

Board's Jurisdiction.

Upon every principle of justice, as well as by the practice and precedents heretofore prevailing, and (as we understand them) according to this Court's decisions construing the very provisions now in question, the Board of General Appraisers had the right, exercised by it, to inquire into the *legality* of the collector's action, and to correct his error of *law*, upon protest.

The government's contention to the contrary, "so far as it relies on authority, fails in precedent; so far as it rests on principle, fails in reason." (9 B. & S. 538.)

The sum of the decisions is this; an appraiser's honest action and judgment in the ascertainment of *a legally-prescribed market value*, is conclusive, and cannot be impeached by proof adduced to show it excessive *in fact*, however arrived at, *provided* the officer kept within the requirements of law in determining it. In the hardly-supposable case of fraud, this would nullify the appraisement, as it vitiates everything. If, without fraud, the appraiser, or collector, exceeds his power by going beyond, instead of according to, the

law, this is proper ground of protest; and this is the proper method of correcting such legal error.

This Court has expressed it, that if *a wrong principle* is applied, the appraisal is not conclusive, but can be judicially corrected, upon protest.

Stating the general rule, as to the conclusiveness of an appraiser's valuation, BRADLEY, J. adds;—

"But whilst this is the general rule, it is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable".

Robertson v. Frank, 132 U. S. 24.

Badger v. Cusimano, 130 *Id.* 39,

where it is said (p. 43); "The only inquiry is, whether the collector acted *within the power conferred* on him by statute", etc. (130 *Id.* 43.)

Hilton v. Merritt, 110 *Id.* 106 is there cited. *(Ibid.)*

In that case (130 U. S. 39) the impeachment of the collector's action was that, "without pretending there was any mistake or fraud in the invoice value of the fruit, caused an appraisement of each importation to be made" which was illegally made to include charges, etc. *(Id.)*; cited in 132 *Id.* 26, where the appraisement adopted by the collector was held illegal. Reference is there (132 U. S. 126) made to Oberteuffer v. Robertson, 116 *Id.* 499, where the appraiser added the cost of cartons "to make market value, in marketable condition." (116 U. S. 501.) It was held the remedy was by protest, not by reappraisement. *(Id.* 515-6.*)*

Arthur v. Goddard, 96 U. S. 145.

This is in conformity with Judge CURTIS' opinion, in Burgess v. Converse; that the importer is not bound to take an appeal "if the government appraisers have not proceeded in conformity with the authority conferred on them by law." In my judgment, he may and should, in such a case, make his protest, and point out the irregularity", etc. (2 Curtis, 220.) In this Court, where the judgment in

this case was affirmed, the dissenting chief-justice and associates did not question that a protest was the proper course of procedure, but they did not consider the one there filed sufficiently specific. (18 How. 418.) The whole Court could not fail to agree that the acts of Congress impose limitations on the authority of the appraisers "and *determine the conditions on which the validity of their assessment depends.* (*Ibid.* 416.)

Greeley v. Burgess, 18 How. 413.
Arthur v. Goddard, 96 U. S. 147.
Oberteuffer v. Robertson, 116 *Id.* 499.
Oelbermann v. Merritt, 123 *Id.* 356.
Auffmordt v. Hedden, 137 *Id.* 324, bot.
Earnshaw v. U. S. 146 *Id.* 66.
1 Blatc. 346; 2 *Id.* 385 and 401.
3 *Id.* 117; 122; 126-7; 142; 145; 368; 378; 385; 399.

In the tobacco case, the opinion, per SHIRAS, J., notices, *en passant*, as a well-understood principle, that "an attack upon the *legality* of the appraisement, for the purpose of having it declared illegal, would be the only means of redress *by a court* for an illegal exaction of duties based upon an *erroneous* valuation". Erhardt v. Schroeder, 155 U. S. 130; Arigat v. Hedden, *Ib.* 228.

That is our claim; that the *dutiable* value was *erroneously* excessive through the adoption of a method not sanctioned by law.

Whether the action of an appraiser, directed, sanctioned, or adopted by a collector, *is within or transcends the limitations upon his power;* whether he has complied with or disregarded "the conditions upon which the validity of his appraisement depends" (18 Howd. 416); whether his acts are in conformity with or contrary to statutory requirements; MUST *be a question of law;* a judicial question;—hence, to be raised by protest, as the decisions uniformly declare.

A protest which raises this question (as ours does;

Rec. 2, 3; fol. 4) duly filed, and transmitted to the Board, gives the Board of General Appraisers jurisdiction to hear and determine that issue, however they may decide it.

Cornell v. Williams, 20 Wall. 249.

The Board has the same power, under Sec. 14, Act of June 10, 1890, to inquire into the *legality* of an assessment that they have under Sec. 13, to see whether or not it is excessive through an error of judgment on the legitimate facts.

To find out whether an appraiser or collector has obeyed or disobeyed the law, it must be ascertained just what he has really done.

In the present instance, the Board found the importers had stated "the net invoice value" of their merchandise; and under a different heading—*not* as part of this invoice value—the German duty (Rec. 1, fol. 2, § 5); that the latter was inserted 'under duress' *(Id.* 2, fol. 3, § 10*)*; that these, German duty, items were added by the appraiser, as an element of *dutiable* value, to the net invoice values *(Ibid.)*; which items the Board found not to be lawfully an element of *dutiable* value, and reversed the collector's action. *(Id.* 3, fol. 4, § 12.*)*

En passant, note it was as part of *dutiable*—not of foreign-market—value that the local appraiser added this 'German duty' to the correct net invoice values. The dutiable value is, generally, the foreign market value plus such additions as existing law may require to be made. We do not consider the *form* in which the appraiser makes his return as of vital consequence; or that his returning as part of his ascertained 'market value' an item which the law makes non-dutiable would exclude proof of such inclusion to vitiate the appraisal—Oberteuffer and the other "coverings" cases show that such form of return does not shut out proof of what he treated as elements of market value—but we wish to note that, in the present case, the sum made up

by adding this German duty to invoice values was returned as the 'dutiable' instead of the 'market' value because the appraiser personally did not deem it part of the market-value, and thus framed his return to facilitate the presentation of the legal question of the propriety of the assessment for duty of this item.

It is only the value in the principal foreign markets that the law requires the collector to cause to be appraised (R. S. § 2906) and the appraisers to ascertain. (*Id.*, Sec. 2902; Act of June 10, 1890, Sec. 10-26, Stats. 136.)

Claiming here that the Board had jurisdiction to review the *legality* of the collector's and appraisers' action relative to *market* value, we will further note, in a subsequent division of this brief, the difference between market and dutiable value; since, *a fortiori*, have the Board the indisputable right to review the latter under Sec. 14, Act of June 10, 1890. See *post*, pp. 15-19, division III.

The question whether the appraiser's (and collector's) action was legal or illegal is presented by the second question certified by the Circuit Court of Appeals, and is immaterial under the first;—which only asks whether the Board of General Appraisers have jurisdiction to inquire into the *legality* of the appraiser's (so, incidentally, the collector's) doings when an importer protests against them as illegal, after they have been adopted by the collector as the basis of his assessment and exaction of duty.

Such jurisdiction must exist:—else the most explicit and mandatory provisions of law are nullified, or are made merely directory to an administrative officer, who can disregard them at will, so long as he is not guilty of fraud in so doing; making them only binding upon him *in foro conscientiæ*. Such construction of statutes affecting vast commercial and pecuniary interests cannot be correct.

Congress must have perceived the truth of Justice BRADLEY's observation, that "Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, that where law ends, tyranny begins." (104 U. S. 702 top.)

II.

Second Question. Appraiser's action illegal.

"(2.) If the first question is answered in the affirmative, was the 'German duty' lawfully included by the appraiser in his estimate of *dutiable* value?" Rec. 4 top, fol. 5.)

This question must be answered in the negative.

The nineteenth section of the administrative act of June 10, 1890, states;—

"that the duty shall be assessed upon the actual market-value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is *there bought and sold, for exportation to the United States*," etc. (26 Stats. 139, bottom, § 19.)

The eighth finding of the Board of General Appraisers states the facts that

"(8) The merchandise can be purchased in bond for exportation in the principal markets of Germany, at the net invoice prices, and *without* paying the so-called German duty. *The merchandise involved in this action was so purchased for exportation.*" (Rec. 2, top, fol. 3, § 8.)

Whatever else may be argued as to this nineteenth section, the use we wish to make of it here is, that it is a recognition by Congress, in the very enactment of this law, of the existing *fact*, found by the Board to be a fact, that there is a value, in principal foreign markets, attaching to merchandise, there freely bought and sold to anybody choosing to buy, in the ordinary course of trade, for exportation; there so dealt in, as a subject of export trade; "in the condition" to be exported to the United States, and peculiarly in that condition.

Then the inquiry is, what is the value of *such* merchandise, so situated, in the open markets of its purchase and sale, at the d te of its exportation.

If similar goods, dif ntly situated and conditioned, have there a different ue, this is not the value upon which our laws base ou duty. Its value as an export governs.

This language was adopted by Congress after the Treasury Department had acquiesced, for a quarter century in the legal construction for which we now contend. Ever since the beginning of 1871, this German duty has been held no part of the dutiable value of merchandise imported from Germany, until about the date of our importations, when this long-prevailing custom was abandoned, and the German duty was added to make dutiable value, as stated in this record.

In 1869, the question arose as to certain malt imported by Murray, Nelson & Co. into Chicago from Canada, where it had been purchased in bond. The Secretary directed the Collectors of Chicago and New York to include in the valuation of such merchandise for duty the consumption tax, not exacted in the country of production if the goods were exported. Murray, Nelson & Co. protested and brought suit, which was tried in the latter part of 1870, before Judge BLODGETT, who sustained the protest; holding the inclusion of the tax on consumption in the dutiable value of goods bought in bond to be illegal. This case is not reported;

but the acquiescence of the Treasury Department in this decision is stated in SS. 775, which is in the form of a letter, which was addressed by Secretary Boutwell to Thomas Murphy, then Collector of the Port of New-York. It bears date January 5, 1871, and says:

"The Department, *after due consideration*, has concluded to acquiesce in the decision of the United States Circuit Court, and reverse its former instructions accordingly.

"The dutiable value of malt imported from Canada will, therefore, hereafter be taken at its value in bond in that country, when it shall satisfactorily appear that the article was purchased in bond.

The same rule will be held applicable to tea, coffee, wine, etc., exported from England to the United States which are chargeable with duty on their entry into consumption in that country, but which is not exacted on the exportation thereof from bond, and *also to any other importation similarly situated.*" *(SS. 775.)*

Of this instruction, the Courts take judicial cognizance. Caha v. U. S., 152 U. S. 212.

In addition to acquiescence in the malt decision by Judge BLODGETT, the Treas. Dept. acted in conformity therewith in U. S. v. Leigh, 39 F. R. 764, and declared, June 14, 1883, that a foreign patent was no element of the duty on imported goods. SS. 5759; referring to SS. 3196 April 11, 1877, in which Secy. Sherman said;—

"The report of the appraiser presents the question whether a value can be accepted as a basis for assessment of duty upon books which is less than the value for consumption in the country of export. He states that, in many instances the publisher is compelled to pay a royalty to the author upon works sold for consumption in the country of export which is not paid when the books are exported. *I think it clear that the dutiable value does not include such royalty.*"

He then cites the department's ruling as to tea, and Judge BLODGETT's malt decision.

As to the royalty considered in SS. 5759 Asst. Sec'y French noted that—

"The right to use the article in Great Britain is not bought or sold in this contract for this merchandise, nor is such right an incident in any way to the transaction. The bottles [subject of English patent, and of duty here] are not intended to be used in Great Britain, and there seems to be no reason why the purchaser should pay for the right to use them in Great Britain, which neither he nor the seller contemplates."

SS. 9800 is of similar purport, except that it expressly relates to this German duty, addressed to the U. S. Appraiser at New-York, dated January 9, 1890, nineteen years after that above quoted. Its tenor is this:—

"SIR, The letter of Asst. Appr. Birdsall, with your indorsement of the 16th ultimo is received, concerning cotton velvets imported from Germany, which were there dyed and completed from fabrics imported into that country in the grey and exported with allowance of a rebate of the duty paid on the raw fabric. The question is submitted as to whether the German duties should be estimated as an element of the dutiable value of the goods.

As stated by the assistant appraiser, the question now raised was long since determined by the court (the Department acquiescing, SS. 775) to the effect that where goods are purchased in bond in a foreign country the tax or duty does not form an element of market value.

It is therefore suggested that upon appraisal of the merchandise mentioned, action should be had in conformity to such ruling."

It will be perceived (if this letter accurately states the position) that the Treasury here extends the principle beyond the Malt case, to goods which have once paid the impost and had it refunded; which was not the malt case, *nor is it ours;* no tax was asked of us.

Mr. Birdsall was the assistant-appraiser who reported upon our goods also.

These rulings were cited by the Board of General Appraisers, which, after making findings substantially

reproduced in the record (pp. 1 to 3, fols. 2 to 5) observed;—

"We have made the foregoing findings of fact *after extended inquiry and investigation.*"

After stating the question at issue, the Board says;—

"*There is nothing in the several appraisers' returns which indicates that these officers professed to ascertain the market-value of the goods per se to be more than the value specified in the invoice*, with the lawful charges added, as authorized by § 19, act of June 10, 1890. As said in Goddard v. Arthur, 96 U. S. 145, where the appraiser disallowed certain discounts in estimating market value, '*they simply gave a construction to the invoice*'. They decided, in other words, *as a legal proposition*, that the invoice, plus the tax, was to be taken as the proper market value.

The practice of the Customs officers, for nearly twenty years prior to the enactment of the act of June 10, 1890, has been not to include this German duty in the estimate of market value."

Here follows mention of the decision of the Circuit Court (per BLODGETT, J.) and of the Treasury Department's acquiescence, and subsequent rulings, and a quotation from Robertson v. Downing, 127 U. S. 613, that such acquiescence "is not to be disregarded without the most cogent and persuasive reasons."

The Board's opinion proceeds;—"This principle, so often repeated by the U. S. Supreme Court, is entitled to still more consideration when applied to a department ruling *on an authoritative judicial decision*, as in the present case."

Edwards v. Darby, 12 Wheat. 210.
U. S. v. State Bank, 6 Pet. 39.
U. S. v. Alexander, 12 Wall. 179–181.
Peabody v. Stark, 16 *Id.* 244.
Smythe v. Fiske, 23 *Id.* 382.
U. S. v. Moore, 95 U. S. 763.
Same v. Pugh, 99 *Id.* 267–9.
Hahn v. U. S. 107 *Id.* 406.
Brown v. Same, 113 *Id.* 570–1.
U. S. v. Hill, 120 *Id.* 182–3.
Same v. Philbrick, *Ibid.* 59.
Same v. Alabama, 142 *Id.* 621.
Same v. Un. Pac. 148 *Id.* 572.
Mich. v. Jackson, 37 U. S. Ap. 228–9.

So many cases are not cited to show the principle indisputable, but to indicate the application of it; as Mr. Justice BREWER observed, in U. S. v. Un. Pac., 37 F. R. 556, top (affirmed 148 U. S. 572) "it is interesting to note *the growth* of this principle in our law. From the time Justice TRIMBLE announced it so cautiously, in 1827, it has gained strength every time it was again considered by the Court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before. And this is a case where that doctrine is eminently worthy of application." (37 F. R. 556.)

In a case touching the retention of interest upon the discount of a note, thus actually receiving more than the statutory rate, the N. Y. Court of Appeals, while admitting this to be contrary to the natural reading of the statute, yet considered the decisions of the lower Courts, that such discount did not violate the usury laws, had been too long followed to be changed. The Opinion, per DENIO, J., proceeds:

"It does not, however, in my opinion, stand less firmly than it would do had it the sanction of legislative authority. I disclaim altogether any right in this Court to overturn a principle which has been established and uniformly acted upon for nearly forty years, and during that time has frequently been reaffirmed by our principal courts of *original* jurisdiction, though it should happen not to have been adjudged by the court of ultimate appeal." Marvine v. Hymers, 12 N. Y. 231 top.

An element which, *in fact*, never entered into the market value, anywhere, but which was expressly excluded from it in Germany, is nowhere a part of it *in law*. There is no such thing as a constructive market value *in law*, which does not exist *in fact*.

We paid the price at which the owner held the goods, for sale to anybody; the price at which they were freely offered to all the world. If a German

bought them for use at home, he would have paid a tax on consumption; but the goods in bond are not subject to it; and never become so, if exported.

If our goods had been made liable to pay it, by the terms of the law, it would be no reason for not computing it, because (by oversight or otherwise) they may have escaped the payment; but they never did so become liable.

The tax in question was laid upon the CONSUMPTION *of goods; not upon the goods per se.* It was a license to consume.

This tax, included by the collector, was *remitted* by the German government; *not* collected and refunded, like our drawbacks.

Yet the Supreme Court said the legal effect of our refunding was to make the exported imports free.

> "The purpose of the drawback provision is to make duty free imports which are manufactured here and then returned," etc. . . . —articles which are not sold or consumed in the United States. . . . The drawback provision was simply a mode of making the linseed, so imported and exported, without distribution in the country, *duty free*", etc.
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> Campbell v. U. S. 107 U. S. 413.

More decidedly is this true of articles upon which no duty has been levied;—as to which the state of facts which alone justify its imposition has never existed.

A somewhat analogous case (but not so strong for the importer as ours is) is that of U. S. v. Leigh, 39 F. R. 764, cited *supra* in which it was adjudged erroneous for the collector to include in the appraisement, made under his direction (R. S. § 2906), as part of the dutiable value of a machine, patented in England, the royalty fee paid by a purchaser for its use in the United States, which was included in the gross sum he paid the vendor, when he bought the machine in England, but *not* as part of the price of the machine itself. Judge COLT said:

"It is agreed that in the purchase by the defendant in England of the machine the royalty-fee formed no part of the purchase-price paid by him. *It is difficult*, THEREFORE, *to see how it can be held to be part of the market-value or wholesale price there*, simply because the purchaser from the defendant [importer] was obliged to pay a royalty fee for its use in this country. *Suppose a machine had been purchased in England for use in some country where there was no patent upon it;* COULD IT BE HELD THAT THE ROYALTY FEE EXACTED FOR ITS USE IN THE COUNTRY WHERE IT WAS PATENTED SHOULD BE ADDED IN ESTIMATING THE MARKET-PRICE." (39 F. R. 764.) See, accordingly, ss. 5759 quoted *ante*, p. 16.

The tariff-act of Aug. 28, 1894, in par. 182½, relating to sugars, imposes one mill additional duty upon all sugars from countries paying a bounty upon export, with a proviso that it should not be laid on sugar shown to have received, upon exportation, merely a rebate of the duties paid upon the importation of the material from which it was made.

III.

Dutiable vs. Market value.

The facts stated as the basis of the inquiries made show that the collector's assessment, against which we protest, was based "upon the *dutiable* value of the merchandise, decided by the appraiser and reported by him to the collector." (Rec. 1, fol. 2, § 3.) The case adds:—"In estimating and appraising the actual market value," etc.,—"the appraiser decided that the *dutiable* value of such merchandise equalled the sum of the net invoice value and the German duty added together, and reported to the collector this decision as to the *dutiable* value of the merchandise appraised."

(Id., 2, fol. 3, § 9.*)* The next following paragraph (10) repeats this statement. *(Ib.* § 10.*)*

We have quoted *(ante*, p. 12*)* the Board's language, that nothing in the appraisers' returns "indicates that these officers professed to ascertain the market-value of the goods, *per se*, to be more than the value specified in the invoice", etc.

The difference between the market-value, which the appraisers are to ascertain, and the dutiable value, upon which the collector is to base his assessment, is as clearly indicated in the act of 1823, first creating appraisers, as it is in the administrative act of 1890. The fifth section, act of 1823, requires that "to the appraised value, if appraised" shall be added all charges, except insurance, plus 20%, as the basis of duty. (3 Stats. 732-3.) This act only required an appraisement at the collector's option *(Id.* 730 top*)* but the act of 1828 made it imperative, in terms substantially as repeated in later legislation; saying that "to the value of said goods, so ascertained" there is to be added charges, etc.; "and the said *ad valorem* rates shall be estimated on said aggregate amount," etc. (4 Stats. 274.)

It is unnecessary to follow the statutes down; but R. S. sec. 2902 is seen to require the appraising officers "to ascertain, estimate and appraise the true and actual market value," etc., at the time of exportation, and in the principal markets, etc.; while R. S. sec. 2907 requires that "In determining the *dutiable* value of merchandise, there shall be added to the cost, or to the actual wholesale price, or general market-value," certain specified items.

Wilson v. Maxwell, 2 Blatc., 321.
Sampson v. Peaslee, 20 How. 575-6.

The existing law, act of June 10, 1890, § 10, prescribes the appraisers' duty in similar, if not identical, language. The nineteenth section, as hereinbefore mentioned *(ante*, p. 8*)* requires duly to be assessed

upon the market value of the goods, "in the condition in which such merchandise is there bought and sold for exportation to the United States." In that condition it may be worth more or less than in any other. The transcript in the Oberteuffer case (# 1192, Oct. Tr., 1885) shows that the goods there mentioned were exported to the United States in a different condition from that in which they were shipped to other North-American countries.

Chief-Justice APPLETON observed: "The ice, besides its value in use, had value *as an article of merchandise for exportation.*" (68 Me. 462.)

He quotes this from 1 Wharton on Evi. § 449;—"Value, it must be remembered, consists in the estimate, or opinion, of those influencing the market, attachable to certain *intrinsic qualities* belonging to the article to be valued."

Washington v. Webster, 68 Me., 463.

It is because of the possession of these intrinsic qualities that the importer buys the article abroad and through these he expects to sell them here. A tax, collectible only in case the article is consumed within the imperial boundaries, is not an intrinsic quality. Whatever the domestic German consumer pays is partly tax and partly on account of inherent qualities. He is, to a certain extent, a trammeled purchaser. The price at which the goods are "*freely* offered to all the world" (3 Wall. 125) is that attaching to their intrinsic qualities only.

For thirty years or more, "actual cost" to the individual importer was the basis of duty-assessment. The act of June 30, 1842, c. 270, § 16 (5 Stats. 563) is the first to require the appraisement of "the actual market value, or wholesale price . . in the principal markets of the country," etc. Here, the "actual market value" and "wholesale price" are synonymous; for the value in any market must be indicated by the

prices actually paid in wholesale dealings in that market.

Meixell v. Kirkpatrick, 29 Kans. 679.
Murray v. Stanton, 99 Mass., 348.

The idea that value depends upon intrinsic qualities is sometimes conveyed by reference to the "available uses" for which these qualities fit the property.

Low vs. R. R. 63 N. H. 558.
Esch vs. C., M. & St. P. 72 Wis. 231-2.

The language of tariffs is addressed to our own people, and especially to those engaged in commercial transactions, for their guidance in carrying on business.

"Tariff acts, as the Supreme Court has repeatedly held, are concerned with trade and commerce. They are presumed to be framed after a careful examination of commercial conditions, and are to be construed in the light which a knowledge of those conditions affords.

U. S. vs. Blumlein, 14 U. S. Ap. 107.
Same vs. Herrmann, *Ibid.* 416.

Language, especially denominations—nevertheless, *all* language—of tariffs is used according to commercial understanding.

U. S. vs. 112 Casks, 8 Pet. 279.
Elliott vs. Swartwout, 10 *Id.* 151,
and cases *passim.*

"Especially should this view prevail as to laws made for the government of the importer. His business is regulated by them; and it is but reasonable that, like the language of marine policies, and the terms of the law merchant, supposed to be especially applicable to this class, these laws should be construed as universally understood by the importer and trader." Arthur vs. Morrison, 96 U. S. 110.

As heretofore noted, the judicial construction of the law as to foreign market value, in cases like the present, acquiesced in by the Treasury Department, for many

years, has been that given it by the Board of General Appraisers and the Circuit Court, for which we now contend.

IV.

Cases cited by government below.

Taking these cases chronologically, it will be found that, *upon their facts*, they do not sustain the government's contention here; but the opinions expressly discriminate the cases presented from those having facts such as exist in the present case.

Hilton v. Merritt, 110 U. S. 97, was decided January 14, 1884. The plaintiffs' *only* complaint in that case was that the General Appraiser and the Collector set too high a value upon the goods *per se;* on the *admitted* constituents of value—those inherent qualities that gave value to the goods everywhere;—*not* that any item was unlawfully added to the ascertained, to make an artificial *dutiable*, value. The opinion thereupon concluded;—

"We are of opinion, *therefore*, that the valuation made by the customs officers was not open to question in an action at law, as long as the officers acted without fraud, and within the power conferred on them by the statute." (110 U. S. 106 bottom.)

Auffmordt v. Hedden, 137 U. S. 310, was decided Dec. 8, 1890. Like the Hilton case, the protest was simply a denial of the correctness of the appraised market-value; asserting it attached too high a value to the goods *per se*. The decision merely reiterates, that an appraisement of the lawful market-value is conclusive, where the appraisers, "in appraising, act within the scope of the powers conferred upon them." (137 U. S. 324 bottom.)

Referring to Hilton v. Merritt, the Auffmordt opinion states that the evidence there ruled out "was evidence

that tended *only* to show carelessness or irregularity in the discharge of their duties by the appraisers, but not that they had assumed powers not conferred by statute." (137 U. S. 325 middle.)

Comparing the cases cited by plaintiff in the Auffmordt case with that case, the Auffmordt Opinion notes that the cited cases were (and Auffmordt's was not) " where to the admitted market value of an importation there was *added* such additional value as was equal to a reduction made in the valuation of the cases containing the goods, as in Badger vs. Cusimano, 130 U. S., 39. Those were instances of errors outside the valuation itself, and outside of the appraisement required by statute " (137 U. S., 328, bottom.) Yet, in Badger vs. Cusimano, the form of the appraiser's return was to state an increased dutiable value, above that of the invoice ; but the Court ascertained how the increase was made, and declared the method adopted illegal—in that it included what it should not have included.

In the Oberteuffer case, reference to the transcript, and to the opinion of the Circuit Court (24 F. R., 852) shows that the cost of boxes, etc., was claimed (and held by that Court) to be part of market value, the appraiser's report being ' add to make market value in marketable condition.' This Court held, however, that a protest, and not a reappraisement, was the proper remedy, the report being matter of form, the real question one of legality (116 U. S., 515-6).

Earnshaw v. U. S. 146 U. S. 60, again rules that an appraisement is conclusive, " when properly conducted ;" otherwise, otherwise. Whether it *is* ' properly conducted ' or not is a judicial question ; necessarily to be determined by inquiring and ascertaining what its conduct was. The Earnshaw opinion prosecutes such an inquiry, and finds no impropriety ; but such procedure and finding implies the right and power, and the duty, to find the other way, wherever the facts require. It assumes the right and necessity of such an examination by the Court into the proceedings whenever they

are protested against as fraudulent, illegal, or improperly conducted;—*not* when the merchant simply asserts that the duly-ascertained market-value is put too high.

In Badger v. Cusimano, the *form* was, that the appraiser reported an increased market-value; the *fact*, that the collector caused the inclusion of a non-dutiable item. "He did what the law did not authorize him to do, namely, increased the *dutiable* value of the oranges, although they were invoiced and entered at their true *market*-value." (130 U. S. 42; also, 43.) The same is stated to be the case in Robertson v. Frank Bros. 132 U. S. 26.

As viewed by this Court, the Passavant case (148 U. S. 214) was simply another instance of an attempt to review judicially a *re-appraisement by the Board* had under the thirteenth section of the act of June 10, 1890, called for by the importers upon the ground that the valuation of the goods *per se* was too high; not that the dutiable value was illegally computed and declared. The Court considered all claim upon this latter ground "abandoned" (148 U. S. 216).

Shoenfeld v. Hendricks, 152 U. S. 691, simply held that the repeal of Rev. Stats. sec. 3011 precluded the maintenance of any suit *against the collector* for his action in the assessment of duty.

In U. S. v. Klingenberg, 153 U. S. 101, 103–4, the *defendant in error* contended the judicial review of the Board's action under sections 14 and 15, act of June 10, 1890, was confined exclusively to the subject of rate and classification; which is the position assumed now in this case, or which was taken in the courts below. This Court, in the Klingenberg case, said "not so." The opinion italicized the statement that it is the collector's decision "as to the rate and *amount* of duties, including all dutiable costs and charges" that can be reviewed on protest under section 14 (153 U. S., 101), adding: "This section clearly allows and provides for an appeal by the importer from the decision of the collector as to *both* rate and amount of duties," etc. (*Ibid.*, 101, bottom).

Touching this very claim, made by the U. S. Attorney in the present case below, this Court, in the last-cited case, upon the last page of its opinion, observed:

"Under a proper construction of sections 14 and 15 of the act of June 10, 1890, it cannot be held that the right of review by the Circuit Court is limited and confined, as contended by the appellee, to the two subjects of classification and rate of duty" (*Ibid.*, 104).

In U. S. vs. Jahn, 155 U. S. 109, 117, the same point was affirmed by a mere reference to the Klingenberg case, as decisive of it.

Erhardt v. Schroeder, 155 U. S. 130, middle, states the position for which we here contend.

The first paragraph of the syllabus in Origet v. Hedden, 155 U. S. 228—and the opinion, p. 235 top—states the law just as Judge CURTIS did in Burgess v. Converse, 2 Curt. 220.

And in Muser v. Magone, at page 247 of Vol. 155 U. S. Rep., the Chief-Justice states that an appraisement is open to judicial attack where illegal items have been added independently of the real market-value of the goods.

In the present instance, the law of the land, as laid down by the Courts, acquiesced in by the Treasury Department, was that the German duty was not dutiable; yet the collector so instructed the appraiser that he disregarded this law.

We have referred to these cases, which were cited below, upon the assumption they will be again cited here; not having yet been favored with the appellant's brief, and the appearance of this case upon the day-call prior to the Thanksgiving recess forbidding further delay in printing this brief.

EDWIN B. SMITH,
120 Broadway,
New-York.
of counsel for appellees.

APPENDIX.

United States vs. Passavant & Co.

WHEELER, J.

These goods were subject to an import duty in Germany if for consumption, and were free of it if for exportation. The appraiser added the amount of that duty to the wholesale price of the goods in that country in ascertaining the dutiable value here; and the Board of General Appraisers did not. Question is made whether this is a proper mode of raising the question as to the addition of that duty; but according to the answer of the Supreme Court to the question of the Circuit Court of Appeals in United States vs. Jahn & Co., Nov. 5, 1894, it seems so to be. [155 U. S. 109.]

Section 19 of the Customs Administrative Act provides specifically that the dutiable value shall be the wholesale price of such merchandise as bought and sold in the principal markets of that country, in the same condition, including coverings, "and all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment" (26 Stat., 139). This German duty was never paid, and never became or could become any cost, charge or expense incident to placing the merchandise in condition for shipment. The statute provides for adding charges incident to the exportation, but not for those which would only have been incident to doing something else with the goods (United States vs. Leigh, 39 Fed. Rep., 764).

Judgment affirmed.